Editor's note: Appealed -- aff'd, Civ. No. 79-96 TUC-MAR (D.Ariz. Dec. 14, 1983); see also George Rodda, Jr., 37 IBLA 189 (Oct. 11, 1978) (reversed by Civ.No. 79-96 TUC-MAR (D.Ariz. Dec. 14, 1983)).

GEORGE RODDA, JR.

IBLA 75-422 Decided October 4, 1976

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting Soldier's Additional Homestead Rights Application, A 8857.

Affirmed in part, reversed in part and remanded, and a hearing ordered in part.

1. Scrip: Validity -- Res Judicata -- Rules of Practice: Appeals: Generally

   While the Department of the Interior does not rigidly apply the doctrine of administrative finality so as to bar any subsequent reassertion of soldier's additional homestead scrip rights which have been determined to be invalid, it is incumbent upon an applicant seeking to exercise such rights to submit compelling legal or equitable reasons for reconsideration.

2. Scrip: Recordation -- Scrip: Validity -- Soldiers' Additional Homesteads: Generally

   The requirement of the Act of August 5, 1955, 69 Stat. 535, that within 6 months of any transfer of scrip rights the holding or claim of right must be presented for recordation by the Department, presupposes a valid transfer. Where the holder of a soldier's additional homestead right shows that the transfer was fraudulent and without his knowledge, the failure of the fraudulent transferee to record the right will not extinguish the right claimed by the innocent holder.

3. Scrip: Validity -- Soldiers' Additional Homesteads: Generally

Upon the death of a soldier-entryman the soldier's additional homestead right vests in his estate, subject to the right of his widow or minor orphan children to appropriate it pursuant to the terms of the statutory grant. Upon the death of the soldier-entryman's widow, and in the absence of minor orphan children, the right becomes absolute in the heirs of the soldier-entryman at the time of his death.

4. Res Judicata -- Scrip: Validity -- Soldiers' Additional Homesteads: Generally

Where an applicant seeks to assert a soldier's additional homestead right which has been determined to be invalid in an earlier proceeding, and does not submit compelling legal or equitable reasons for reconsideration, but merely seeks to reargue the previous determination, the attempted exercise of soldier's additional homestead rights will be rejected.

APPEARANCES: George Rodda, Jr., Esq., pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

George Rodda, Jr., has appealed from a decision of the Arizona State Office, Bureau of Land Management, dated February 26, 1975, rejecting his Soldier's Additional Homestead (SAH) application A 8857. Appellant had sought to assert the rights as a remote assignee of three separate soldier-entrymen: Oren Whitcomb (40 acres); Daniel C. Burleigh (8.20 acres); and John B. Dill (50.03 acres). The State Office decision noted that the right of Whitcomb had terminated for failure to record an assignment to the Angel Island Corporation as required by the Act of August 5, 1955, 69 Stat. 535, 43 U.S.C. § 274 (note) (1970). The Daniel C. Burleigh right was rejected on the grounds that it had been rejected in a former application, Nevada 065299, and further, had been determined invalid by decision of the Eastern States Office, BLM, dated December 12, 1974, in an application for cash election filed by one Paul B. Broken. The right of John B. Dill was rejected for the failure to submit evidence that the soldier, John B. Dill, and the entryman of the same name, were one and the same person. Additionally, the State Office noted that the decision of December 12, 1974, had rejected Broken's application based on the right of John B. Dill. Appellant timely filed a notice of appeal seeking review of the State Office determinations.

[1] A matter of initial concern is whether the failure to appeal the decision of December 12, 1974, rendered by the Eastern States Office denying the application for a cash election by Broken, forecloses a subsequent reassertion by the appellant of the SAH rights of Burleigh and Dill.

Appellant argues that at the time the December 12 decision was received no party was "adversely affected" within the ambit of 43 CFR 4.410 which establishes who may appeal from a decision of an officer of the BLM. Appellant's contentions flow from an analysis of the chronology of events occurring in December of 1974. On December 19, Paul B. Broken assigned all interest in the rights of Burleigh and Dill to the appellant. On December 24, appellant mailed his application for Arizona lands to the Arizona State Office. On December 26, Bronken received notification from the Eastern States Office, BLM, of the rejection of his SAH cash election application. Thus, it is contended that at the time the decision was received Bronken had no present interest in the SAH rights of Burleigh and Dill and that appellant had no interest in the cash election application of Bronken and therefore no party was adversely affected by the decision.

Appellant's analysis, however, is flawed. While it is true that appellant had no interest in the cash election application filed by Bronken, he would obviously be greatly affected by any decision abrogating the res of the assignment, i.e., the SAH rights of Burleigh and Dill. Appellant does not contend that he was unaware of the December 12 decision. Rather, he states that he did not feel he was adversely affected. Clearly, had he appealed the rejection of Bronken's application to the extent that it determined the validity of the subsisting SAH rights he would have had standing. The question then is whether appellant is estopped from asserting the SAH rights of Burleigh and Dill. We do not believe that he is so estopped.

The effect of a rejection of an SAH application upon subsequent adjudications of applications based upon the same SAH right may depend on the circumstances of the rejection and of the subsequent applications. When an SAH application was made for lands that were determined not to be available, the rejection of the application clearly does not forestall subsequent reassertion. Furthermore, even in those cases where the rejection of the SAH application was predicated on a defect in the SAH right, as for example when an application was rejected for failure to establish that a soldier and an entryman were one and the same, the Department has not refused to accept subsequent reapplications based on that right. See, e.g., Margaret W. Chivers, 21 IBLA 124 (1975). At the same time, however, the Department has ruled that in such a situation it is incumbent for an SAH applicant to present compelling legal or equitable reasons. Failure to do so will result

in the invocation of the doctrine of the finality of administrative action and require rejection of the application. Ben Cohen, 21 IBLA 330 (1975). Analysis of the appellant's SAH application will be premised on the above principles. To the extent that evidence submitted to establish a SAH right was deemed insufficient in a previous determination, compelling legal or equitable reasons for reconsideration must be presented or the SAH application will be rejected. Ben Cohen, supra.

[2] Because of the complexity and wide diversity of the issues presented the three SAH rights will be treated seriatim. The first SAH right is that of Oren Whitcomb. The State Office rejected the assertion of the Whitcomb right because of a failure to record an assignment from one Norman Lewis McBride to the Angel Island Corporation. Additionally, the State Office decision noted that the assignment by McBride to Angel Island Corporation divested him of any interest in Whitcomb's SAH right and therefore appellant took nothing by his later assignment from McBride.

The recordation of assignments of various types of land scrip, including SAH, was required in the Act of August 5, 1955, 69 Stat. 535, 43 U.S.C. § 274 (note) (1970). Section 2 of that Act provides, in relevant part, "[i]n the case of a transfer after the effective date of this Act by assignment * * * the holding or claim of right so transferred shall be presented to the Department of the Interior within six months after such transfer, for recordation by it * * *." Section 4 of the Act prescribes that claims not presented timely for recordation shall not thereafter be accepted by the Secretary as a basis for the acquisition of land. See also, 43 CFR 2610.0-3(a).

McBride originally acquired the SAH right of Oren Whitcomb by an assignment on September 8, 1932, from one B. I. Mason. According to an affidavit of McBride submitted with the appeal, the purchase was made through one Roy Maggart. In 1953, McBride made application LA 0100017 seeking land in California. By decision of the Associate Director, BLM, dated March 9, 1953, the application was rejected because the lands sought were lands valuable for oil and gas deposits and further because it would not be in the public interest to allow private acquisition of California coastal lands. An appeal of this decision was subsequently dismissed for failure to timely file the notice of appeal. See C. Andrew Petas, A-26789 (July 28, 1954). 1/

1/ The Petas decision noted that the Associate Director had not examined either the ownership or validity of the rights tendered.

Approximately a year after the Petas decision, McBride requested the return of the papers relating to the Whitcomb SAH right. The papers were returned to him together with a circular informing him of the necessity of recording his scrip by August 5, 1957. See Act of August 5, 1955, supra. According to McBride's affidavit he was contacted in July 1957, by one Eldon J. Fairbanks, who reminded him of the August 5, 1957, deadline for recordation of outstanding scrip. McBride's affidavit then states:

> * * * This phone call jogged my memory of the earlier circular mailed by the Bureau. In the presence of Mr. Fairbanks who promised to fill out correctly the duplicate forms on legal length paper printed by the government, I signed two forms and gave them and the SAH rights paper to Mr. Fairbanks who promised the recordation would be timely because he would see that the papers were hand -- carried to Washington, D.C.

The affidavit then relates that when McBride sought the return of the original documents he was advised by Fairbanks that the recordation office retained them.

On January 15, 1958, Angel Island Corporation, represented as a Nevada Corporation, made application for lands in California (LA 0154473) using the Whitcomb right as the basis for the attempted acquisition. According to the application the right had been acquired by assignment. The application was signed by Roy Maggart as President and Eldon J. Fairbanks as Secretary of Angel Island Corporation. By memorandum of February 4, 1958, the Director, BLM, advised the Los Angeles Office that the scrip was valid in the amount of 40.00 acres, but noted "it will be necessary for the applicant to record the assignment to him of this scrip in accordance with 43 CFR 130.6(a) [now 43 CFR 2611.1]." On March 14, 1958, the application was rejected on the grounds that the land applied for was not part of the public domain. There was no appeal from this determination. The evidence of scrip rights was apparently returned to the Angel Island Corporation.

On March 19, 1962, Fairbanks filed an application for land based on the Whitcomb right claiming a December 8, 1961, assignment from McBride. See Nevada 058310. That application was rejected on July 18, 1962, on the grounds that McBride had previously assigned all his interest in the scrip right of Whitcomb to Angel Island Corporation and had no assignable interest left.

On September 18, 1962, Fairbanks made another application for land in Nevada, this time claiming an assignment from Angel Island Corporation. See Nevada 059070. By decision of January 22, 1963, the September application was rejected on the grounds that the

assignment from McBride to Angel Island Corporation had never been recorded and therefore under the provisions of the Act of August 5, 1955, supra, the scrip right was no longer valid. By letter of September 11, 1963, the papers establishing Fairbank's claim to the SAH right were returned to Fairbanks. On December 19, 1974, McBride assigned to appellant.

McBride, in his affidavit submitted on appeal, stated that: "[p]rior to [the assignment to Rodda] I never appeared before Alice E. Weider or executed any assignment of the SAH Right of Oren Whitcomb to Roy Maggart, Eldon J. Fairbanks, Angel Island Corporation or any other person or corporation, or have I received any consideration for any alleged assignment."

We are faced with both a legal question and a question of proof. The first question involves whether assuming a fraudulent assignment, the failure of Angel Island Corporation to record its purported assignment from McBride nullifies the scrip. It seems clear to us that the section 4 of the Act of August 5, 1955, supra, presupposed a real assignment and not a fraudulent transfer. It is important to note that this is not a case in which scrip rights have already been exercised by one party and another party is attempting to utilize the same rights by alleging a fraudulent assignment. Such a controversy, perforce, would properly be the subject of state court litigation. Congress would not have intended to deprive defrauded scrip holders of their rights absent injury to the United States.

The ultimate question is whether the purported assignment from McBride to Angel Island Corporation was, in fact, fraudulent. The above recital of the scrip's checkered usage raises a number of questions. McBride states in his affidavit, that at the time of the recordation of the scrip in July 1957, he "had become disenchanted with the concept of obtaining government lands." He implies that this was the result of his unsuccessful attempt to obtain lands in LA 0100017 and "newspaper coverage of Roy Maggart's conviction on scrip fraud transactions, and personal circumstances." He then states that he consulted a Los Angeles attorney who advised him "besides the criminal conviction and sentencing of Roy Maggart, a disbarred California attorney, there were numerous judgments recorded and that my chances for recovery were nil." All this presumably occurred in late '57 or early '58. Yet suddenly, in December of 1974, McBride assigned the Whitcomb right to the appellant. Why this great period of inaction followed by a sudden assignment? It should be noted that during this period Fairbanks twice attempted to exercise the Whitcomb SAH right, once on the basis of a purported assignment from McBride.

Regulation 43 CFR 2612.3 provides that no transaction for the satisfaction of a scrip claim shall be consummated unless and until

it is determined the scrip is valid. The Whitcomb scrip right was valid at the time of its transfer to McBride, and it was recorded by McBride pursuant to the Act of August 4, 1955, 69 Stat. 534.

Any individual seeking Government land must clearly show his right to the same. We are not disposed to accept the affidavit tendered as a sufficient showing. In fairness to the appellant, however, we will allow him an opportunity to substantiate his allegations at a hearing. See 43 CFR 4.415. We note that appellant stated that "Mr. Fairbanks will supply an affidavit, upon request, that he, as was Assignor McBride, was swindled of substantial monies and scrip rights by Roy Maggart." Fairbank's testimony would certainly be useful in determining the truth of appellant's contentions. We reiterate that appellant has the burden of clearly establishing his present right to the Whitcomb scrip. Failure to do this must result in the rejection of the claim.

[3] The second SAH right which appellant seeks to exercise is the right of Daniel C. Burleigh in the amount of 8.20 acres. Daniel C. Burleigh had used the remaining right, aggregating 151.80 acres in an entry canceled for abandonment on August 28, 1869. The soldier-entryman died on January 10, 1884, and was survived by his wife, Annie C. Burleigh. Annie C. Burleigh died on November 11, 1914, having neither remarried nor exercised the remaining SAH right. At the time of the soldier-entryman's death in 1884 he was also survived by a daughter, Louise C. Burleigh. Louise C. Burleigh married one Atherton Curtis, who was also her cousin, on August 1, 1894, and died on December 17, 1910, leaving all her property by will to her husband.

Subsequent to the death of Annie C. Burleigh, Atherton Curtis claimed the SAH right to 8.20 acres under the will of his wife and also through his relationship as her cousin. In 1930 Curtis assigned his rights to one Paul D. Cook. A number of assignments of the right ensued. The right was duly recorded on August 5, 1957. Finally, the right was offered in Nevada 065299 by Paul B. Bronken. By decision of March 4, 1965, the exercise of the right was denied on the grounds that "[t]he son-in-law, husband of the predeceased adult daughter, obtained no rights under the will of his late wife, or otherwise, unless it can be shown that he is the sole heir of Daniel C. Burleigh." No appeal was taken from this determination. The SAH right was also offered by Bronken in his application for cash election which was rejected on December 12, 1974, and which was discussed above.

Section 3 of the Act of June 8, 1872, 17 Stat. 333, provides, in relevant part:

> That in the case of the death of any person who would be entitled to a homestead under the provisions of the first section of this act, his widow, if unmarried, or in the case of her death or marriage, then his minor orphan children * * * shall be entitled to all the benefits enumerated in this act * * *.

The Department held in Fidelo C. Sharp, 35 L.D. 164 (1906), that upon the death of the soldier-entryman, an unexercised soldier's additional right remains in the soldier-entryman's estate subject to the right to appropriate by the widow, or by minor orphan children. Id. at 165. Although a subsequent administrative ruling brought this doctrine into question (Circular No. 528, 46 L.D. 32 (1917)), the Supreme Court of the United States reaffirmed the correctness of the Sharp analysis in the case of Anderson v. Clune, 269 U.S. 140 (1925).

Thus, the widow of the soldier-entryman not exercising her statutory right to appropriate in her lifetime, and no minor children having survived her, the SAH right became absolute in the heirs of the soldier-entryman. Daniel C. Burleigh died in the jurisdiction of the State of Maine. Appellant has provided this Board with a copy of the Maine statutes relating to the descent of property upon intestacy which were in force at the time of the soldier-entryman's death.

The SAH right is personalty. See Mullen v. Wine, 26 F. 206 (1886). The applicable Maine statutes provided that the personal estate of an intestate followed the rules of distribution of real estate subject to certain exceptions. One of the exceptions relevant here is in section 9 of Chapter 75 of the Maine statutes: "If he [the intestate] leaves a widow and issue the widow takes one third, if no issue one half, and if no kindred, the whole." Thus, Annie C. Burleigh, the soldier-entryman's widow took one-third of the SAH right by virtue of the laws of distribution of the State of Maine. The statutes relating to the distribution of real property provide the property descends in equal shares to the intestate's children. Ch. 75, sec. 1. Thus, Louise C. Burleigh received the remaining two-thirds of the SAH, or the right to 5.47 acres.

We have noted above that Atherton Curtis was the sole devisee of Louis Burleigh Curtis, and therefore was possessed of the right

to 5.47 acres upon her death. Appellant has not shown, however, that Atherton Curtis acquired any rights upon the subsequent death of Annie C. Burleigh. 2/ Therefore, we reverse the State Office's rejection of the Daniel C. Burleigh right to the extent of 5.47 acres and affirm it as to the remainder.

[4] Finally, the State Office rejected the assertion of the right of one John B. Dill in the amount of 50.03 acres. The State Office decision noted that the right had been held to be invalid in letter decision "K" EWW of August 22, 1933, in application Sacramento 026186, as well as in the decision of December 14, 1974, rejecting Paul B. Bronken's cash election application. In both cases, the purported SAH right was rejected because it had not been shown that John B. Dill the soldier was the same person who made entry so as to qualify for a soldier's additional homestead.

One John B. Dill served in Companies "B" and "K," First Regiment, Missouri Engineers from August 5, 1861, to September 28, 1864, when he was honorably discharged. He subsequently received pension certificate No. 572689.

On May 9, 1870, one John Dill made homestead entry No. 2984 at the Little Rock, Arkansas, Land Office, for the NW 1/4 fractional sec. 3, T. 11 N., R. 9 W., 5th P.M., Cleburne County, Arkansas, aggregating 69.97 acres. The question is whether John B. Dill, the Missouri soldier, is the same person who made the Arkansas entry.

This is the precise question that was dealt with in Sacramento 026186. Therein, the Assistant Commissioner of the General Land Office held that the evidence submitted "fails to convince this office that the soldier was the person who made said homestead entry." 3/

2/ The fact that Atherton Curtis was Annie C. Burleigh's cousin does not show, by any stretch of logic, that he was her heir at the time of her death. Appellant contends there was a will by Annie C. Burleigh leaving property to Curtis. However, the record does not contain the asserted will passing the right from Mrs. Burleigh to Curtis. If proof that SAH passed to Curtis can be presented, appellant may be entitled to additional land.

3/ Appellant protests at considerable length that a number of subsequent references to the Sacramento case incorrectly state that the right was found to be invalid because no evidence had been submitted to show that the soldier and the entryman were one and the same. While we agree that the decision of the Assistant Commissioner, G.L.O., found that insufficient evidence rather than no evidence had been submitted, we do not see how this difference has any substantial bearing upon appellant's case. He must still show that the original decision was in error.

Appellant contends that the original decision was in error. He places great reliance on a report by one Ben F. Rynearson, an examiner for the General Land Office, dated January 15, 1933. In that report, Rynearson concluded:

> I realize the field investigation has resulted in not being able to show conclusively that the Missouri John Dill came into Arkansas and is the party, who, on May 9, 1870 made application for the land in Cleburne County. On the other hand, the investigation does not prove that he did not do so. Outside of the records, the evidence is all circumstantial, yet I am of the opinion the application of Alfred C. Helvey, assignee of the right of John Dill, Sacramento 026186 should be allowed.

The letter decision "K" EWW rejected this recommendation. This rejection was based on a number of factors. Thus, the decision noted "The signatures of the soldier [submitted in support of the applications] do not compare favorably with the signature of the John Dill who made the Little Rock homestead entry on May 9, 1870, the handwriting appearing quite dissimilar * * *." Additionally, a letter from the Bureau of Pensions to the Commission of the General Land Office, dated May 6, 1931, noted that "[u]nder date of May 24, 1912 soldier gave his several places of residence since leaving the service as Paris, Ill., until 1874; Murdock, Ill., 1900, since then Hume, Ill." Thus, the Missouri John B. Dill never alleged that he ever lived in Arkansas, much less made a homestead entry there.

Appellant does not deny that the signatures are different. Instead he contends that it is possible that "an agent" signed the application. The statute, however, required:

> That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before said register or receiver that * * * such application is made for his or her exclusive use and benefit * * *. (Emphasis added.)

Section 2 of the Act of June 21, 1866, 14 Stat. 67.

In William Webb, 15 L.D. 156 (1892), the Secretary of the Interior held that "[a]ll that the homestead law and the instructions thereunder contemplated is, that a bona fide and proper application should be made for the tract desired by the applicant." Id. at 158. In that case however, the homestead applicant submitted an affidavit that he could neither read nor write and

that he had instructed his attorney to sign his name to his application. No such affidavit accompanied John Dill's application. What must be presumed, therefore, is that the signature on the homestead entry application was that of John Dill, the entryman.

We noted above that in situations where the Department has rejected the attempted exercise of a SAH right because of a failure to establish the validity of the alleged right it is the duty of a subsequent applicant to submit compelling legal or equitable reasons for reconsideration. Appellant has not submitted new evidence but has instead relied on evidence which the Department had previously found to be insufficient. Therefore, the exercise of the alleged John B. Dill right must be rejected. Ben Cohen, supra. Furthermore, it is our view that the prior rejection of the right was clearly correct.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Arizona State Office is affirmed as to its rejection of the John B. Dill right in the amount of 50.03 acres and the Daniel C. Burleigh right to the extent of 2.73 acres, and reversed as to the Daniel C. Burleigh right in the amount of 5.47 acres. The State Office decision rejecting the Oren Whitcomb right in the amount of 40 acres is set aside and the case file is referred to the Hearings Division for a hearing in accord with this opinion.

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Douglas E. Henriques
Administrative Judge

I concur:

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Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN PART, DISSENTING IN PART:

While I agree generally with the conclusions in the majority opinion regarding the three soldier additional homestead rights, I favor a somewhat different suggested resolution to the problems raised in connection with the Oren Whitcomb right.

Mr. Rodda has not submitted the documents evidencing the transfers in the chain of title nor the right. Instead, his application referred to documents and attempted to incorporate them by reference from earlier case records in which the right had been tendered for satisfaction, namely, N-059070 and LA-0100017 and N-065299. The records in these cases show that after each adverse adjudication by the Bureau of Land Management, the documents were returned to the applicant. The last applicant prior to Mr. Rodda was Mr. Eldon J. Fairbanks. In order to satisfy the SAH right, this Department should have the essential documentation of the right. The best evidence would be the original documents of assignment and transfer in the chain of title stemming back to the soldier-homesteader, Oren Whitcomb, forward to Mr. McBride, Mr. Rodda's assignor. There should also be clear evidence that Mr. McBride, in fact, had an assignable interest in the SAH right when he assigned to Mr. Rodda.

I am not certain that an administrative hearing alone can satisfactorily resolve questions pertaining to the missing documents or to related issues such as the alleged fraudulent use of such documents by Angel Island Corporation and Mr. Fairbanks. Therefore, I dissent from that part of the decision ordering the hearing. If the original documents cannot be submitted by Mr. Rodda, I suggest that satisfactory evidence in lieu of such documents may very well have to be a court decree setting forth the rights of the various parties to the documents and relating to the alleged fraudulent assignments or prior attempted uses of the SAH right.

Therefore, I would suspend Mr. Rodda's application as to the Whitcomb right, and require him to submit evidence that he has instituted court proceedings within a reasonable time to recover the documents and to establish the alleged fraud and wrongful use of the SAH right by Angel Island Corporation and Mr. Fairbanks. If he failed to do so, his application would then be rejected.

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Joan B. Thompson
Administrative Judge